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NLRB Overrules 2016 Browning-Ferris Decision on Joint Employer Liability

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On December 14, 2017, the National Labor Relations Board (NLRB) overruled its 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), and reinstated the "direct and immediate" standard to determine joint employer liability that had controlled pre-*Browning-Ferris* for decades. *See Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB. No. 156 (2017) (*Hy-Brand*).

Prior to *Browning-Ferris*, the NLRB held that the "essential element" when evaluating joint employer status "was whether the putative joint employer's control over employment matters is ***direct and immediate***." *Airborne Express*, 338 NLRB 597 (2002) (emphasis added). The Obama-era NLRB dramatically expanded this standard, finding that "control exercised ***indirectly*** – such as through an intermediary – may establish joint-employer status."

Criticizing *Browning-Ferris*'s broader test for joint employer liability as "a distortion of common law," "contrary to the [NLRA]," and "ill-advised as a matter of policy," the NLRB in *Hy-Brand* decided to "return to the principles governing joint employer that existed" pre-*Browning-Ferris*.

In its sweeping reversal, the NLRB identified "five major problems" with *Browning-Ferris*:

1. The NLRB concluded that the *Browning-Ferris* test "exceeds the Board's statutory authority" by relying on theories of "economic realities" and "statutory purpose" that "extended the definitions of 'employee' and 'employer' far beyond the common law limits that Congress and the Supreme Court have stated must apply."
2. The NLRB found that the *Browning-Ferris* rationale for altering the definition of "employer," i.e., "to protect bargaining from limitations resulting from the absence from the table of third parties that indirectly affect employment-related issues," was misplaced. *Browning-Ferris* is grounded in the idea that the current economy is a "radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities." The Trump NLRB disagreed, noting that Congress "was obviously aware of the existence of third-party relationships" when it limited bargaining obligations to the employer in 1935, limited the definition of employee and employer to their common law agency meaning in 1947, and strengthened secondary boycott protection afforded to third parties in 1947 and 1959.
3. The NLRB determined that *Browning-Ferris* "mistakenly interpreted" courts' deference to the Board's authority to make factual distinctions when applying the agency standard as a grant of authority to modify the standard itself. The NLRB opined that its "fundamental disagreement" with the *Browning-Ferris* test was that it made indirect control "potentially dispositive without any evidence of direct control even in a single area."
4. The NLRB stated that the *Browning-Ferris* standard "deprived employees, unions, and employers of certainty and predictability regarding the identity of the 'employer'" by imposing "unprecedented" bargaining obligations "based solely on a never-exercised right to exercise 'indirect' control over what the Board later decides is an "essential" employment term, to be determined in litigation on a case-by-case basis."

5. The NLRB said that *Browning-Ferris*'s attempt to correct a perceived inequality of bargaining leverage was the "wrong target," finding that this was an "economic reality" that the Board lacked the authority to address.

Under the standard articulated by the NLRB in *Hy-Brand*, a finding of joint employer status requires "proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

Following the NLRB's decision, Browning-Ferris Industries of California and the NLRB advised the U.S. Court of Appeals for the D.C. Circuit of the standard announced in *Hy-Brand*. The NLRB asked the D.C. Circuit to remand *Browning-Ferris* to the NLRB for reconsideration in light of *Hy-Brand*. The court agreed and remanded the case on December 22, 2017.

The reversal will have a dramatic effect on the claim that McDonald's and its franchisees are joint employers. However, the decision is subject to reversal under a future progressive administration. The issue could be permanently resolved if the Senate passes the Save Local Business Act, which was passed by the House in November 2017. The Act provides that "[a] person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline."